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9 UNITED STATES DISTRICT COURT

10 DISTRICT OF NEVADA

11 PARNELL COLVIN, RICHARD VELLA,

No. 2:21-cv-02109-RFB-NJK

12 Plaintiffs,

**REPLY TO RESPONSE TO MOTION
TO DISMISS AMENDED COMPLAINT**

13 v.

[ECF No. 34]

14 TOMMY WHITE AKA THOMAS WHITE,
15 INTERNATIONAL UNION OF NORTH
AMERICA LOCAL 872 LABORERS,

16 Defendants.

18 Defendants, Laborers' International Union of North America, Local 872¹ ("Union,"
19 "Laborers' Local 872," or "Local 872"), Thomas White, Marco Hernandez, and Chelsy Torres, by
20 and through their undersigned counsel of record, submit this Reply to Plaintiffs' Response
21 (captioned "Reply to Defendants [sic] Motion to Dismiss" [ECF No. 34]) to Defendants' Motion
22 to Dismiss Amended Complaint (ECF No. 20). This reply is based on the papers and pleadings on
23 file, the below memorandum of points and authorities, the accompanying Declaration of Counsel
24 and exhibit thereto, and any further argument that the Court may hear.

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26
27
28 ¹ Plaintiff incorrectly named Laborers' International Union of North America, Local 872 as
"International Union of North America Local 872 Laborers".

1 **REPLY MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In their untimely opposition to the Motion to Dismiss Amended Complaint, Plaintiffs—
 4 for a second time—have failed to grapple with the numerous weighty procedural and substantive
 5 defenses against the Amended Complaint. Rather than attempt to demonstrate that they have
 6 established subject-matter jurisdiction over the case, personal jurisdiction over each of the four
 7 named Defendants through proper service of process, and that they have pleaded viable causes of
 8 action in the Amended Complaint, Plaintiffs instead have conclusorily asserted that their case is
 9 proper and it should proceed past the pleading stage. Even accounting for their *pro se* status and
 10 liberally construing the Amended Complaint, as the Court must do, *see Erickson v. Pardus*, 551
 11 U.S. 89, 94 (2007), Plaintiffs woefully fail to meet their burdens on all of these points. For these
 12 reasons, explained more fully below, the Court should dismiss this action without leave to amend.

13 **II. PROCEDURAL HISTORY**

14 A more complete procedural history is set out in the Motion to Dismiss Amended
 15 Complaint. *See* ECF No. 20, at 4–5. Directly relevant to the instant motion, after Plaintiffs’
 16 attempt to serve process on July 5, 2022, Defendants filed a Motion to Dismiss (ECF No. 10)
 17 attacking the original Complaint for untimely service of process, insufficient service of process,
 18 lack of service of process, failure to adequately plead subject-matter jurisdiction, and failure to
 19 state a claim. While that motion was pending, Defendants filed an unnecessary Motion to Amend
 20 Complaint (ECF No. 14), which introduced some procedural confusion as to whether the
 21 proposed Amended Complaint they attached to their Motion to Amend is in fact the operative
 22 pleading or whether it is not yet considered to be the operative pleading because it was not filed
 23 as such. *See* Defs.’ Reply to Resp. to Mot. to Dismiss, ECF No. 17, at 2–4. Understanding that it
 24 is likely the Court will ultimately deem the proposed amended pleading to be the operative
 25 complaint,² and to ensure time did not inadvertently expire under Fed. R. Civ. P. 15(a)(3) to

27
 28 2 This confusion could’ve been avoided if Plaintiffs Colvin and Vela had, in a timely fashion,
 simply filed their amended complaint as of right under Fed. R. Civ. P. 15(a)(1)(B).

1 respond to the amended pleading, Defendants filed the underlying Motion to Dismiss Amended
 2 Complaint (ECF No. 20).

3 Since then, other than the Motion to Dismiss Amended Complaint (ECF No. 20) and the
 4 Motion to Dismiss the original Complaint (ECF No. 10), there are now pending before the Court
 5 a Motion to Stay Discovery (ECF No. 21); a fully briefed motion for an extension of time to
 6 respond to the Motion to Dismiss Amended Complaint (ECF No. 23 [Plaintiffs' motion]; ECF No.
 7 25 [Defendants' opposition]), as to which the Court has yet to rule; and Plaintiffs' Motion to
 8 Vacate an Order Sealing ECF No. 16 (ECF No. 30), which the Defendants opposed (ECF No. 35).

9 **Procedural Confusion Caused by The Unnecessary Motion to Amend**

10 Plaintiffs are correct that an amended pleading normally moots any pending motions to
 11 dismiss. An “amended complaint supersedes the original, the latter being treated thereafter as
 12 non-existent.” *Valadez-Lopez v. Chertoff*, 656 F.3d 851, 857 (9th Cir. 2011) (citation omitted);
 13 *see also Ramirez v. Cty. of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015). However, rather
 14 than file an amended complaint as of right under Rule 15(a)(1)(B), Plaintiffs inexplicably chose
 15 to unnecessarily seek the Court’s leave to file an amended complaint. *See* ECF No. 14. Rule
 16 15(a)(1)(B) provides that a party may amend its pleading once as a matter of right “if the pleading
 17 is one to which a responsive pleading is required” within the earlier of “21 days after service of a
 18 responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f).” Fed. R.
 19 Civ. P. 15 (a)(1). The underlying complaint was filed on November 29, 2021, and it is a pleading
 20 to which a response is required. ECF No. 1; *see also* Fed. R. Civ. P. 12(a). The Motion to Dismiss
 21 was filed on July 26, 2022, thus making an amended complaint without the Court’s leave timely
 22 under Fed. R. Civ. P. 15(a)(1)(B) if filed on or before August 16, 2022.

23 This procedural confusion matters because resolution of whether the Amended Complaint
 24 is the operative pleading dictates whether the Motion to Dismiss the original Complaint is now
 25 moot, and thus the Court should turn its attention to the motion to dismiss the amended
 26 complaint. But because the proposed amended pleading attached to Plaintiffs’ Motion to Amend
 27 has not been formally docketed as an amended complaint, *see generally* Docket, it is potentially
 28 unclear whether the proposed amended complaint attached to the Motion to Amend at ECF No.

14-1 is in fact the operative pleading. *See Order, Dessaints v. Jayco, Inc.*, No. 2:21-cv-00931-JCM-NJK, ECF No. 13 (D. Nev. July 6, 2021)³ (noting plaintiffs' timely filing of an unnecessary motion to amend, denying it as unnecessary, and ordering plaintiffs "to file and serve their amended complaint" within the applicable 21-day deadline). If the Court orders the proposed amended complaint at ECF No. 14-1 to be construed as or deemed to be a timely and properly filed amended pleading, then Defendants must necessarily concede the Motion to Dismiss filed at ECF No. 10 is rendered moot by the Amended Complaint under the authorities cited above. There is some authority in this District suggesting that the Court will so construe amended pleadings when they are filed by *pro se* parties along with an unnecessary motion to amend:

Some courts have held that the filing of an unnecessary motion for leave to amend waives the matter-of-course amendment right. *See, e.g., Coventry First, LLC v. McCarty*, 605 F.3d 865, 870 & n.2 (11th Cir. 2010). Even the courts that have recognized such a waiver have been reluctant to apply it to a *pro se* litigant. *See, e.g., id.* at 870 n.2 (distinguishing prior case on that ground). The Ninth Circuit has repeatedly highlighted the duty of courts to liberally construe the filings of *pro se* litigants, especially prisoners bringing civil rights claims. *E.g., Blaisdell v. Frappiea*, 729 F.3d 1237, 1241 (9th Cir. 2016). Based on the circumstances of this case, the Court declines to find that Plaintiff waived her ability to file an amended complaint as a matter of course by unnecessarily filing a motion seeking leave to amend.

Order, *Saintal v. Pesce*, No. 2:15-cv-02460-GMN-NJK, ECF No. 32, at 3 & n.3 (D. Nev. Apr. 17, 2017).⁴ Accordingly, the Court should first decide which pleading is the operative complaint.

³ A Westlaw citation is not available for this order. Accordingly, a true and correct copy of the Order was attached as Exhibit 1 to the Declaration of Counsel on file at ECF No. 17-2. *See LR IA 10-3(b)* ("Cases . . . must not be attached as exhibits . . . unless they are not accessible on Westlaw or LexisNexis."). "[T]he court can take judicial notice of 'public records and government documents available from reliable sources on the Internet, such as websites run by governmental agencies.'" *Romero v. Securus Tech., Inc.*, 216 F. Supp. 3d 1078, 1084 n.1 (S.D. Cal. 2016) (quoting *Gerritsen v. Warner Bros. Entm't Inc.*, 112 F. Supp. 3d 1011, 1033 (C.D. Cal. 2015)).

⁴ A Westlaw citation is not available for this order. Accordingly, a true and correct copy of the Order is attached Exhibit 2 to the Declaration of Counsel on file at ECF No. 17-2. *See LR IA 10-3(b)* ("Cases . . . must not be attached as exhibits . . . unless they are not accessible on Westlaw or LexisNexis."). *See also supra* n.3 (taking judicial notice of government records is proper).

1 **III. ARGUMENT**

2 As a preliminary matter, the Plaintiffs' response to the Motion to Dismiss Amended
 3 Complaint is untimely filed.⁵ As such, the Court may construe the lack of a timely response as
 4 consent to granting the motion or as an admission the motion has merit. *See LR 7-2(d)*.

5 But assuming the Court reaches the merits, as was true with their response to the Motion
 6 to Dismiss the original Complaint (ECF No. 15), Plaintiffs Colvin and Vela do not seriously
 7 contend with or rebut any of the substantial pleading deficiencies and other procedural defenses
 8 asserted in the Motion to Dismiss Amended Complaint. *See LR 7-2(d)* ("The failure of an
 9 opposing party to file points and authorities in response to any motion, except a motion under
 10 Fed. R. Civ. P. 56 or a motion for attorney's fees, constitutes a consent to the granting of the
 11 motion."). Leeway permitted *pro se* parties is limited to the allegations in the pleadings
 12 themselves; it does not exempt *pro se* parties from following the rules of procedure. *Ghazali v.*
 13 *Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (*pro se* parties are still "bound by the rules of procedure")
 14 (citing *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987)). "[P]ro se litigants in the ordinary civil
 15 case should not be treated more favorably than parties with attorneys of record." *Jacobsen v.*
 16 *Filler*, 790 F.2d 1362, 1364 (9th Cir. 1986).

17 Rather than confront the defenses presented, the Plaintiffs misunderstand, mischaracterize,
 18 or invent their own versions of the defenses presented and choose to respond to their contrived
 19 reality rather than engage with the weighty defenses actually asserted against the Amended
 20 Complaint. This fails to meet Plaintiffs' burden to respond to the Motion. Therefore, the Motion
 21 should be granted. Each point Defendants can discern in opposition to the Motion—many of
 22 which are not relevant to disposing of the motion—is addressed below.

23 **A. THE RESPONSE TO THE MOTION TO AMEND COMPLAINT IS UNTIMELY.**

24 The Plaintiffs' response to the Motion to Dismiss Amended Complaint is untimely filed.⁶
 25 The Motion was filed on August 23, 2022, and was served on the Plaintiffs' by mail. *See ECF*

26 ⁵ Unless the Court grants *nunc pro tunc* the Plaintiffs' motion to extend time (ECF No. 23), which
 27 was opposed (ECF No. 25), and permits even more time beyond the September 30, 2022 deadline
 28 the Plaintiffs sought, the response in opposition is untimely and may properly be disregarded.

⁶ *See supra* n.5.

1 No. 23, at 25. The Court entered a *Klingele* Minute Order the following day, directing a response
 2 to the Motion was due within 14 days of the date of the Minute Order. ECF No. 24. As such, by
 3 undersigned counsel's calculation, a response to the Motion was due to be filed on or before
 4 September 12, 2022. *See LR 7-2(b)* (for all motions other than summary judgment motions, “[t]he
 5 deadline to file and serve any points and authorities in response to the motion is 14 days after
 6 service of the motion”); Fed. R. Civ. P. 6(d) (adding 3 days for mail service); Fed. R. Civ. P.
 7 6(a)(1)(C) (extending the period to the next day that is not a weekend day or a holiday).

8 Rather than respond by the deadline, Plaintiffs filed a Motion to Extend Time (ECF No.
 9 23), a motion which remains pending. In that motion, Plaintiffs requested until September 30,
 10 2022, within which to file their response to the Motion to Dismiss Amended Complaint. *See ECF*
 11 No. 23, at 2. Defendants opposed the motion. *See ECF No. 25*. Even if the Court grants the
 12 motion *nunc pro tunc*, the response Plaintiffs filed is still untimely. The response was filed on
 13 October 4, 2022, *see ECF No. 34*; Defendants had requested until September 30, 2022, within
 14 which to file the opposition, *see ECF No. 23, at 2*.⁷ Because the response is untimely, the Court
 15 may properly treat the lack of a timely response as a concession the underlying motion has merit
 16 or as consent to granting the motion. *See LR 7-2(d)* (“[F]ailure of an opposing party to file points
 17 and authorities in response to any motion, except a motion under Fed. R. Civ. P. 56 or a motion
 18 for attorney’s fees, constitutes a consent to the granting of the motion.”). Case law confirms the
 19 Court may construe the failure to timely respond to a motion as the non-filing party’s consent to
 20 granting the motion. *See U.S. v. Warren*, 601 F.2d 471, 473–74 (9th Cir. 1979) (applying local
 21 rule deeming non-response as consent by non-moving party to granting a motion); *Righthaven*
 22 *LLC v. Newman*, No. 2:10-cv-01762, 2011 U.S. Dist. LEXIS 80518 (D. Nev. July 22, 2011)
 23

24 ⁷ On Saturday, October 1, 2022, Plaintiff Colvin wrote an email to Judge Boulware’s courtroom
 25 administrator, copying counsel, claiming that the courthouse was inaccessible on Friday,
 26 September 30, 2022, due to some sort of emergency, which prevented persons from entering the
 27 courthouse, and which prevented Mr. Colvin from timely filing Plaintiffs’ response. A true and
 28 correct copy of the email is attached as **Exhibit 1** to the accompanying Declaration of
 undersigned counsel. Mr. Colvin wrote that he spoke with the courtroom administrator, that he was
 told court staff was aware of the issue, and that he was told that he “can come Monday[, October
 3, 2022,] to file my response which I plan to do.” Instead, the response was filed on October 4,
 2022. Plaintiffs offered no contemporaneous explanation or further motion seeking to file the
 response out of time. *See ECF No. 34*.

1 (granting motion to dismiss due to non-moving party's failure, by a matter of mere hours, to
 2 timely respond), *aff'd on reconsideration*, 2011 U.S. Dist. LEXIS 109327 (Sept. 23, 2011)
 3 ("failure to oppose [the] Motion means [the non-moving party] may be deemed to consent to the
 4 granting . . . of the motion."). Defendants therefore request that the Court construe Plaintiffs'
 5 failure to timely oppose the Motion as an admission that the Motion is meritorious, and as consent
 6 to grant the Defendants' Motion to Dismiss Amended Complaint. In the event the Court considers
 7 the late-filed opposition, the Defendants offer the below in reply to Plaintiffs' response to the
 8 Motion to Dismiss Amended Complaint.

9 **B. ATTEMPTED SERVICE OF PROCESS WAS UNTIMELY.**

10 Plaintiffs, claiming service of process was timely effectuated, argue that they "requested
 11 extensions each time to serve the defendants and the court granted each request and by the court
 12 date given by the court to serve and file proof of service with the court." ECF No. 34, at 2:10–11.
 13 No so, as the only service attempt Plaintiffs made was after the date-certain the Court had ordered
 14 by which they were to effectuate service of the summons and complaint. *See Mot. to Dismiss Am.*
 15 *Compl.*, ECF No. 20, at 6, 19 (discussing untimeliness); ECF No. 10, at 8 (same). The Court,
 16 granting Plaintiffs' second motion for more time to effectuate service of the summons and
 17 complaint, *see* ECF No. 6 (second motion), allowed until July 3, 2022, within which to effectuate
 18 service. *See ECF No. 7* (order granting second motion). Because Plaintiffs did not attempt service
 19 until July 5, 2022, *after* the deadline had already expired, whatever "service" has occurred is
 20 untimely. Moreover, to be sure, Defendants offer other procedural defenses with respect to the
 21 service of process Plaintiffs attempted—defenses Plaintiffs ignored. Thus, the Court should
 22 dismiss the case under Rule 4(m) for untimely service of process—or at least quash service.

23 **C. PLAINTIFFS FAIL TO PROVE THEY SERVED THE SUMMONS.**

24 Plaintiffs mischaracterize the nature of Defendants' insufficient service of process and
 25 lack of service of process defenses, generally asserting that they have in fact served all of the
 26 Defendants with copies of the summons and amended complaint. *See ECF No. 34*, at 2–3.
 27 Defendants do not take issue with service being left at the front counter at the Union's Hall with a
 28 Union officer. Indeed, the Union's officers Torres and Hernandez both readily admit receipt of

1 some documentation. *See* Hernandez Decl., ECF No. 10-2, ¶¶ 8–16 & Ex. 1 thereto; Torres Decl.,
 2 ECF No. 10-2, ¶¶ 8–19 & Exs. 1–2 thereto (both discussing receiving a copy of the complaint
 3 herein without a summons). The defenses asserted involve the contents of the purported affidavit
 4 of service, which are facially defective; the total lack of service of the summons on any of the
 5 Defendants, which Plaintiffs ignore entirely in their opposition; and whether service of process
 6 has otherwise been effectively carried out on both of the originally named Defendants and on the
 7 two Defendants who were newly named in the Amended Complaint, such that this Court may
 8 properly exercise personal jurisdiction over them.

9 Plaintiffs completely ignore the strong, substantial, and corroborated evidence
 10 contesting what is stated in Plaintiffs' Affidavit of Service, with Hernandez and Torres
 11 testifying in their declarations that the summons was not delivered at all, as the rules require.
 12 Plaintiffs fail to submit additional evidence to carry their burden demonstrating that service of
 13 process was carried out in a manner required by the rules. *See* Mot. to Dismiss Am. Compl., ECF
 14 No. 20, at 6, 19 (discussing service defects); ECF No. 10 at 8–15 (same). Plaintiffs again claim to
 15 have a video constituting further proof of service, *see* ECF No. 34, at 2:12–13, 3:1–15 (claiming
 16 Plaintiffs video recorded service attempts, and “I have my copy to show proof of service”), but
 17 that video has not been placed into evidence or put before this Court, despite Plaintiffs having had
 18 two opportunities to offer up that supposed evidence. While Defendant Local 872 has necessarily
 19 conceded that the Union did receive some documents and that the person who received the
 20 documents is an officer of the Union, Plaintiffs do not offer any additional evidence to meet their
 21 burden to prove service of the summons, given that the fact of service of the summons has been
 22 adequately controverted here. All Plaintiffs do is claim without evidence that “Defendants was
 23 [sic] served a copy of the complaint and summons together.” ECF No. 34, at 3:11. But this just
 24 amounts to a denial of Defendants’ controversion of the fact of proper service. Plaintiffs offer no
 25 additional evidence of or explanation whatsoever for how service is in fact proper as to each
 26 named Defendant, given that their Affidavit of Service is demonstrably defective. As such, the
 27 Amended Complaint should be dismissed or service quashed for insufficient service of process
 28 and lack of proper service as to each of the Defendants.

1 **D. PLAINTIFFS FAIL TO PROVE THEY HAVE SERVED ALL DEFENDANTS.**

2 Plaintiffs have not proven service on Thomas White because attempting service on him by
 3 leaving a copy of the Complaint at his place of business is insufficient under the applicable case
 4 law, which Defendants cited in their Motion to Dismiss. *See* Mot. to Dismiss Am. Compl., ECF
 5 No. 20, at 18–19 (discussing service defects); ECF No. 10, at 15 (discussing lack of service of
 6 process and insufficient of process on Defendant White). Because Plaintiffs fail to contend with a
 7 fundamental failure of service of process on Thomas White, Defendant White should be
 8 dismissed from the action or have service upon him quashed.

9 Likewise, Defendants fail to explain how the two Defendants who were newly named in
 10 the Amended Complaint (Torres and Hernandez) have been served at all with a summons and the
 11 Amended Complaint. There is no indication on the Docket that the Plaintiffs requested new
 12 summonses after they submitted their Amended Complaint. There is no proof of service of the
 13 Amended Complaint on file as to any of the named four Defendants, *see* ECF No. 20, at 18–19
 14 (discussing service defects), and it appears Plaintiffs have made no attempts to effectuate required
 15 Rule 4 service of the Amended Complaint on any of the Defendants.

16 Because Plaintiffs have demonstrably failed to prove proper service on any of the
 17 Defendants in this action, the Court should dismiss the action for lack of service of process,
 18 especially since giving the Plaintiffs an opportunity to cure service defects would not save this
 19 lawsuit from dismissal for other reasons explained below, including lack of subject-matter
 20 jurisdiction and failure to state a claim upon which relief may be granted.

21 **E. PLAINTIFFS DO NOT CONTEND WITH THE AMENDED COMPLAINT'S
 22 SUBSTANTIAL PLEADING DEFICIENCIES.**

23 Rather than seriously contend with their substantial pleading deficiencies in the Amended
 24 Complaint, which make it unclear whether the Plaintiffs have adequately demonstrated subject-
 25 matter jurisdiction in this Court is proper and whether Plaintiffs' claims, such as they have been
 26 pleaded, viably state causes of action, Plaintiffs merely conclusorily respond that the "court has
 27 subject matter jurisdiction and as the claims plaintiff state [sic] are governed by the federal
 28 government and federal constitution and are within the scope of federal laws and federal statutes

1 [sic] which gives subject matter jurisdiction to hear this case.” ECF No. 34, at 2:16–18. This does
 2 not meet Plaintiffs’ burden to establish subject-matter jurisdiction in this Court.

3 The Amended Complaint offers three bases—three criminal statutes, a provision of the
 4 Americans with Disabilities Act (ADA), and Section 501 of the Labor-Management Reporting
 5 and Disclosure Act of 1959 (LMRDA)—for this Court exercising subject-matter jurisdiction over
 6 the action. Plaintiffs do not explain how subject-matter jurisdiction is proper under a criminal
 7 statute in a civil case brought by private parties. Nor do they explain how the ADA has anything
 8 to do with the claims pleaded against the Defendants, as Plaintiffs do not allege anything to do
 9 with disability discrimination. And despite spending nine pages in the Motion to Dismiss
 10 Amended Complaint demonstrating the substantial pleading defects as to any LMRDA Section
 11 501 claim that Plaintiffs attempt to bring, Plaintiffs offer no response at all to those points in their
 12 response to the Motion to Dismiss Amended Complaint. The closest they come to offering a
 13 substantive response is to state that “Plaintiffs amended complaint shows no confusion it clearly
 14 states forth the claims and statues [sic] that the defendants have committed and continue to
 15 commit,” ECF No. 34, at 3:3–4, and that “Plaintiff will be able to show and prove to a jury that
 16 the defendants we believe have committe [sic] the acts contained in the lawsuit,” *id.* at 3:20–21.
 17 Setting aside whatever “evidence” Plaintiffs may or may not have, as reference to materials
 18 outside the pleadings is not appropriate at the motion to dismiss stage, Plaintiffs cannot proceed
 19 past the pleading stage because they have failed to meet their burden to prove subject-matter
 20 jurisdiction and to plead viable claims for relief.

21 Because Plaintiffs offer no cogent argument with citation to appropriate authority on their
 22 pleading defects as to jurisdiction and claims, the Court should grant the Motion to Dismiss
 23 Amended Complaint for lack of subject-matter jurisdiction and for failure to state a claim.

24 **F. THE COURT SHOULD DENY LEAVE TO AMEND AS FUTILE.**

25 Finally, because the Defendants have failed to grapple for a second time with the
 26 substantial pleading defects exhaustively pointed out in two motions to dismiss, the Court should
 27 decline to grant leave to file a second amended complaint. Leave to amend usually should be
 28 freely given “when justice so requires.” Fed. R. Civ. P. 15(a)(2). *But see In re Western States*

1 *Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 738 (9th Cir. 2013) (while leave to amend
 2 “shall be freely given when justice so requires,” it “is not to be granted automatically”).
 3 Normally, the Court must give a *pro se* litigant with some notice of pleading deficiencies before
 4 denying leave to amend, except where it is absolutely clear that the pleading deficiencies cannot
 5 be cured by amendment. *Cato v. United States*, 70 F. 3d 1103, 1106 (9th Cir. 1995) (citing *Noll v.*
 6 *Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987)).

7 A district court’s discretion in denying leave to amend is “‘particularly broad’ where the
 8 plaintiff has previously amended.” *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1133 (9th Cir.
 9 2013) (plaintiff had “ample opportunity to properly plead a case”). The fact that the pleader failed
 10 to take advantage of previous opportunities to amend, without explanation, may be grounds for
 11 denying leave to amend. *Jang v. Boston Scientific Scimed, Inc.*, 729 F.3d 357, 368 (3rd Cir. 2013)
 12 (“This court has declined to reward a wait-and-see approach to pleading”).

13 Leave to amend may be denied if the proposed amendment is futile or would be subject to
 14 dismissal. *Carrico v. City & Cty. of San Francisco*, 656 F.3d 1002, 1008 (9th Cir. 2011); *FDIC v.*
 15 *Conner*, 20 F.3d 1376, 1385 (5th Cir. 1994) (amendment futile if statute of limitations has run);
 16 *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) (“Although
 17 leave to amend should be given freely, a district court may dismiss without leave where a
 18 plaintiff’s proposed amendments would fail to cure the pleading deficiencies and amendment
 19 would be futile.”). Under this analysis the court determines if the complaint’s “deficiencies can be
 20 cured with additional allegations that are ‘consistent with the challenged pleading’ and that do not
 21 contradict the allegations in the original complaint.” *United States v. Corinthian Colleges*, 655
 22 F.3d 984, 995 (9th Cir. 2011) (quoting *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296–97 (9th Cir.
 23 1990)); *Airs Aromatics, LLC v. Opinion Victoria’s Secret Stores Brand Mgmt., Inc.*, 744 F.3d 595,
 24 600 (9th Cir. 2014); *see Krainski v. Nevada ex rel. Bd. of Regents of Nev. Sys. of Higher Ed.*, 616
 25 F.3d 963, 972 (9th Cir. 2010) (proposed amendment is futile if clear that complaint could not be
 26 saved by any amendment).

27 Here, Plaintiffs’ proposed amendments would be futile, and Plaintiffs have already had
 28 one opportunity to amend their complaint, with the benefit of the first motion to dismiss. No new

1 facts can save claims brought under the Criminal Code because Plaintiffs have no standing to
2 enforce criminal law. The same is true for claims under the ADA, as they have not pleaded any
3 facts in the two complaints to even hint this case is about disability discrimination. Even claims
4 that may be closer to a proper mark, under 29 U.S.C. § 501, cannot be amended to make them
5 viable. Plaintiffs have not met the statutory prerequisites for filing suit under 29 U.S.C. § 501(b)
6 as of the date this action was commenced. Even if they could properly allege they met the
7 statutory prerequisites under Section 501(b), they nevertheless are not proper parties to bring
8 claims under Section 501 because they are, by their own admission, not members in good
9 standing of the Union. It is absolutely clear that no amendment can cure the defects. Any
10 amendment would contradict earlier pleadings, and thus render amendment futile under
11 *Corinthian Colleges*, 655 F.3d at 995. The Court should dismiss the case without leave to amend.

IV. CONCLUSION

If Plaintiffs' accompanying proposed amended complaint at ECF No. 14-1 is construed as the operative amended complaint, the Motion to Dismiss at ECF No. 10 is rendered moot. If the Court instead orders Plaintiffs to file the proposed amended complaint as an amended complaint, the Motion to Dismiss is not (yet) moot, making this Reply Brief timely and proper. Because the Plaintiffs did not substantively address the weighty and substantial defenses Defendants have asserted in the Motion to Dismiss Amended Complaint, the Court should grant the Motion for lack of subject-matter jurisdiction, untimely service of process as to all Defendants, insufficient service of process as to all Defendants, lack of service of process as to Defendants White, Hernandez, and Torres, and for failure to state a claim.

22 | Dated: October 10, 2022

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /s/ Sean W. McDonald
KRISTINA L. HILLMAN
SEAN W. McDONALD

Attorneys for Defendants Laborers' International Union of North America, Local 872, Thomas White, Marco Hernandez, and Chelsy Torres

27 | 152890\1308495

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

[none]

And I hereby certify that I have mailed by the United States Postal Service, postage prepaid, the document to the following non-CM/ECF participants:

Parnell Colvin
6681 Tara Ave
Las Vegas, NV 89120

Richard Vela
867 N Lamb Blvd Space 82
Las Vegas, NV 89110

And I hereby certify that I have emailed the document to the following non-CM/ECF participants per consent to serve by electronic means noted below:

Parnell Colvin – pc681@yahoo.com
(Per Consent for Electronic Service of Documents, ECF No. 31)

Dated: October 10, 2022

/s/ Sean W. McDonald
An Employee of Weinberg, Roger & Rosenfeld